

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32085

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 553
	)	
Plaintiff-Respondent,	)	Filed: July 16, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DENNIS W. MERRICK,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for attempted robbery, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Dennis W. Merrick appeals from his judgment of conviction for attempted robbery. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Merrick and another individual entered the home of Addie Enger to steal money and methamphetamine from Ken Sala. Sala, who was Enger's boyfriend and lived at the home, had a history of selling drugs, which included several felony convictions. When the police arrived at the home, they heard yelling coming from a back bedroom. An officer later testified he heard words from two individuals as he neared the bedroom and that "one of the voices said, 'just give me what you have.' Very demanding. Very loud. The other voice stated something to the effect [of], 'all I have is a quarter of an ounce.'" When the officers entered the bedroom, they observed Sala on the ground and Merrick standing over Sala pointing a rifle at him.

Merrick was charged with burglary and attempted robbery. Merrick and his co-defendant were tried together. A jury acquitted Merrick of burglary, but found him guilty of attempted robbery. However, a mistrial was declared. Merrick was then retried on the attempted robbery charge and found guilty again. I.C. §§ 18-6501, 18-6502, 18-306. Merrick appeals, asserting the district court committed several errors in instructing the jury.

## II.

### ANALYSIS

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993). To be reversible error, an instruction must mislead the jury or prejudice the defendant. *State v. Macias*, 142 Idaho 509, 510, 129 P.3d 1258, 1259 (Ct. App. 2005).

Merrick first contends that the district court erred by refusing to give a requested jury instruction. The state counters by arguing that Merrick was not entitled to the instruction he requested because the issue of credibility and weight of the evidence was adequately covered by other instructions.

Merrick proposed the following jury instruction:

If you believe from the evidence that any witness has willfully testified falsely in this trial, regarding any material matter testified to by such witness, then the jury may totally disregard the testimony of such witness, except insofar as he is corroborated, to your satisfaction, by other credible evidence, or by facts and circumstances proved during the trial.

Merrick asserts that, because several witnesses testified untruthfully at various times during the course of this case, the district court erred by failing to instruct the jury that it could totally disregard all of a witness's testimony if it believed that the witness had willfully testified untruthfully about a material issue in the case. Merrick relies on *State v. Davis*, 57 Idaho 413, 415-16, 65 P.2d 1385, 1386 (1937), where our Supreme Court concluded that giving an instruction allowing the jury to disregard all of a witness's testimony when it concludes that the witness willfully testified falsely was not error. Therefore, Merrick argues that his proposed

instruction was a correct statement of the law, and it was error for the district court to refuse to so instruct the jury.

In denying Merrick's proposed instruction, the district court articulated:

. . . I think that is a matter that's covered in terms of explaining to the jury repeatedly in the instructions that they are the sole determiners of whether or not they are going to believe the evidence and what weight they are going to give the evidence.

It is well settled that credibility determinations are within the province of the jury. *State v. Allen*, 129 Idaho 556, 558, 929 P.2d 118, 120 (1996); *State v. Herrera-Brito*, 131 Idaho 383, 386, 957 P.2d 1099, 1102 (Ct. App. 1998). However, a trial court is not required to give a requested instruction, even one that is a correct statement of the law, if the subject matter is sufficiently covered by instructions actually given to the jury. *Macias*, 142 Idaho at 511, 129 P.3d at 1260; *State v. Ward*, 135 Idaho 400, 402, 17 P.3d 901, 903 (Ct. App. 2001); *State v. Patterson*, 126 Idaho 227, 230, 880 P.2d 257, 260 (Ct. App. 1994).

In this case, the jury was given multiple instructions concerning its role as the sole determiner of credibility. For example, Jury Instruction No. 11 provided, in part:

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

Furthermore, Jury Instruction No. 11(b) provided, in part: "It is for you alone to determine the truth or lack of truth of a witness' testimony." And, Jury Instruction Nos. 28, 29, and 30 all concluded with a similar admonition, instructing the jury that it is the sole judge of credibility and what weight to attach to evidence.

In this case, the information in Merrick's proposed instruction was adequately covered in several other instructions provided to the jury. Furthermore, Merrick has failed to allege, much

less demonstrate, either how the instructions given misled the jury or how failing to give his instruction prejudiced his case. Therefore, we conclude the district court did not err in refusing to give Merrick's proposed jury instruction.

Merrick also contends that the second sentences in Jury Instruction Nos. 28, 29, and 30 improperly limited the jury's consideration of certain evidence and improperly forbade the jury from reaching certain conclusions based on the evidence presented. Jury Instruction No. 28 provided:

You have been allowed to hear evidence that the alleged victim, Mr. Sala, has a history of lying to the authorities in criminal cases when he is the subject of an investigation, and that Ms. Enger has a history of lying to authorities to protect Mr. Sala. *You are instructed that this evidence, standing alone is not proof that either witness lied to the authorities in this case and you may not use it for that purpose.* You may only use this evidence to weigh what credibility you give to the witnesses [sic] testimony. It is for you alone to determine what evidence to believe and what weight you give to that evidence.

(Emphasis added).

On appeal, Merrick asserts:

[Jury Instruction No. 28] downplayed the effect of the perjured testimony and told the jury that it could not completely disregard the witness but would rather still have to weigh the evidence. However, if the jury completely distrusted any of the witnesses, it was free to disregard their testimony and conclude that they should not be trusted in the instant case. Instruction 28 prevented the jury from so doing . . . .

We disagree with Merrick's assessment of the instruction. Reminding the jury that evidence had been presented showing that two witnesses for the state had a history of lying to authorities did not downplay the effect of the perjured testimony. Furthermore, Merrick failed to demonstrate how the language complained of prohibits the jury from completely disregarding either Enger's or Sala's testimony. The third sentence of the instruction provides that this evidence may be used to weigh the credibility of the witnesses; however, the instruction does not preclude the jury from determining, based on this evidence, that the witness's testimony should be afforded no weight at all because it is patently unbelievable. Merrick's argument regarding Jury Instruction No. 28 is without merit.

Jury Instruction No. 29 provided:

You have been allowed to hear evidence that Mr. Sala has a history of illegally carrying firearms. *You are instructed that this evidence may not be used by you to determine that Mr. Sala was doing anything illegal in this case.* This evidence may only be used by you, in conjunction with other evidence, if the defendant's [sic] had knowledge of this fact and whether that knowledge, if you determine they did possess it, lends credibility to their claim that they acted in self defense in this matter. It is for you alone to determine what weight, if any, you give this evidence.

(Emphasis added).

Merrick asserts that the second sentence in Jury Instruction No. 29 improperly limited the jury's consideration of the evidence presented at trial that Sala had a history of illegally carrying firearms. Specifically, Merrick argues that "the jury could have concluded that Mr. Sala, by having a history of carrying a weapon, and a history of using methamphetamines, and by having a concealed weapon in the instant case, was the aggressor in this case rather than the victim."

We first note that this purpose for which Merrick asserts the jury should have been allowed to consider the evidence is prohibited by I.R.E. 404(b), which expressly disallows evidence of other crimes, wrongs, or acts "to prove the character of a person." Evidence of a pertinent trait of character of a crime victim, such as a victim's propensity for violence when the defendant claims self-defense, is admissible, but generally only through opinion or reputation evidence, not through evidence of specific instances of conduct. I.R.E. 404, 405. Furthermore, the remainder of the instruction informs the jury that evidence of Sala's past illegal possession of firearms, if known to the defendants, could support their claim of self defense. The prohibition in Instruction No. 29 that the jury could not rely on Sala's history of carrying illegal firearms to conclude he was doing anything illegal in this case was consistent with Rules 404 and 405. Therefore, Merrick's argument fails.

Jury Instruction No. 30 provided:

You have been allowed to hear evidence that the alleged victim, Mr. Sala, has several prior felony convictions. *You may not consider that evidence for the purpose of determining he was not the victim of a crime in this case.* This evidence is presented only for the purpose of allowing you to weigh whether Mr. Sala had a motive to lie about the facts in this case and what weight you wish to give his testimony. It is for you alone to determine what evidence to believe and what weight to give to that evidence.

On appeal, Merrick asserts that the second sentence in Jury Instruction No. 30 improperly restricted the jury's ability to consider the evidence of Sala's prior felony convictions. Merrick argues that "if, based on the prior felonies, the jury concluded that Mr. Sala was untrustworthy, they could just [as] easily have concluded that he was not the victim of a crime in this case, yet Instruction 30 does not permit the jury to make that conclusion."

Instruction 30 does not preclude the jury from concluding that Sala was not the victim in this case based on other evidence. Furthermore, the instruction provides that evidence of Sala's prior felonies may be used to assess his credibility in this case. Contrary to Merrick's assertion, there is nothing in the instruction precluding the jury from determining that Sala's testimony was not believable and concluding that, because his testimony was not believable, he was not the victim in this case. Again, Merrick's argument is without merit.

### **III. CONCLUSION**

We conclude that Merrick has failed to demonstrate error in the district court's refusal to give his proposed instruction or in the content of the instructions given. Therefore, Merrick's judgment of conviction for attempted robbery is affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**